IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FIBERLINK COMMUNICATIONS CORPORATION	:	CIVIL ACTION
v.	:	
DIGITAL ISLAND, INC.	:	No. 01-2666

ORDER-MEMORANDUM

AND NOW, this 17th day of July, 2002, the cross-motions for summary judgment of plaintiff Fiberlink Communications Corporation and defendant Digital Island, Inc. are denied. Fed. R. Civ. P. 56.[1] Jurisdiction is diversity, 28 U.S.C. §1332.

According to the complaint, defendant Digital Island, Inc. unjustifiably terminated the parties' contract dated June 28, 2000 and is therefore obligated to pay contractual liquidated damages in the amount of $715,000 or, in the alternative, actual damages. In response, defendant's position is that plaintiff defaulted on the two-year contract in November 2000 when it stopped providing the telecommunications service known as "iPass."[2]

"[T]he fundamental object in interpreting a contract is to ascertain the intent of the

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[1]To obtain a summary judgment, the party having the burden of proof at trial must demonstrate that there is no genuine issue of law or material fact, the court viewing the facts most favorably to the non-movant. See Crissman v. Dover Downs Entertainment, Inc., 2002 WL 849446, *1 (3d Cir. April 30, 2002).

[2]A company named iPass, Inc. sells computer software and services that enable employees of user-companies such as Digital Island, Inc. to make computer connections to the internet by dialing local and toll-free phone numbers from almost anywhere in the world. On November 17, 2000 when plaintiff Fiberlink ceased to make iPass available, defendant Digital terminated its contract with Fiberlink and "signed a contract with a new iPass reseller to continue the iPass service." Joint Pretrial Stip., Agreed Facts at ¶ 21.

parties," Compass Technology, Inc. v. Tseng Laboratories, Inc., 71 F.3d 1125, 1131 (3d Cir. 1995) (citing Z & L Lumber Co. of Atlasburg v. Nordquist, 502 A.2d 697, 699 (Pa. Super. Ct. 1985)) (Pennsylvania law governs the substantive issues of this action). However, if the contract is ambiguous, which is a question of law, that intent may be unclear. Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159, 164 (3d Cir. 2001).[3]

Here, on the one hand, plaintiff points out that the contract: 1) does not refer to iPass; 2) allows defendant the opportunity of transferring to a non-iPass service; and 3) includes billing and other services unrelated to iPass to be rendered directly by Fiberlink. On the other hand, extrinsic evidence suggests that the parties may have understood and believed the contractual term "services" specifically and unequivocally meant iPass.[4] E.g., Def. Mot. Summ. J., Exh. D, Pinsky tr. at 15-21, 23, 26, 30-31; id., Exh. Q, Getty tr. at 44; Id., Exh. F, Campbell tr. at 101 and 114-16. If so, there is an ambiguity the resolution of

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[3]A contract will be declared ambiguous "if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree on the proper construction." Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 93 (3d Cir. 2001) (quoting Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 614 (3d Cir. 1995)). "To determine whether ambiguity exists in a contract, the court may consider 'the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning.'" Id. at 93 (citing Mellon Bank, 619 F.2d at 1011).

[4]"A party may use extrinsic evidence to support its claim of latent ambiguity, but this evidence must show that some specific term or terms in the contract are ambiguous." Id. The "linguistic reference," or "contractual hook," id., in this case is the contractual term "services."

which must be left to the fact-finder.[5] Moreover, whether plaintiff substantially performed the contract by offering its own VPNterprise service as a substitute for iPass cannot be said with any certainty on the present record.[6] Accordingly, both motions for summary judgment must be denied.

Edmund V. Ludwig, J.

[5]"Once the court determines that a party has offered extrinsic evidence capable of establishing latent ambiguity, a decision as to which of the competing interpretations of the contract is the correct one is reserved for the factfinder, who would examine the content of the extrinsic evidence (along with all the other evidence) in order to make this determination." Bohler, 247 F.3d at 94 (citing Mellon Bank ,619 F.2d at 1013-14).

[6]In any event, defendant need not have pleaded anticipatory repudiation in order for its claims to survive plaintiff's motion for summary judgment. 13 Richard A. Lord, Williston on Contracts § 39:37 (4th ed. 2000) ("when an action is brought by the repudiating party, anticipatory repudiation is not an affirmative defense that is required to be specifically pleaded in response"). See Lane Enterprises v. L.B. Foster Co., 700 A.2d 465, 472-73 (Pa. Super. 1997) (repudiation may be shown by a "sufficiently positive" declaration, even in the absence of a demand by the non-repudiating party for "adequate assurance of performance").